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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
(Magistrate Cathy A. Bencivengo)

UNITED STATES OF AMERICA,	)	CASE NO. 08CR 1191 DMS
	)	08MJ 1009
Plaintiff,	)	
vs.	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
	)	VIDEOTAPE DEPOSITION AND
Angel Jose BERMUDEZ (D1)	)	SUBSEQUENT VOLUNTARY DEPORTATION
David PEREZ-Lemos (D2)	)	OF MATERIAL WITNESSES
	)	
	)	DATE: April 29, 2008
	)	TIME: 10:30 a.m.
<u>Defendants.</u>	)	PLACE: Courtroom of Magistrate
	)	Cathy A. Bencivengo

**I**

**BY STATUTE AND CASE LAW,  
THE MOTION SHOULD BE GRANTED**

According to 18 U.S.C. 3144, "no material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can be adequately secured by deposition and if further detention is not necessary to prevent a failure of justice".

Furthermore, Fed R. Crim P. 15(a) specifies that a material witness may make a motion requesting such a deposition and the district court has the authority to order the taking of the deposition and thereafter to discharge the detained witness from

1 custody.

2 As the Fifth Circuit stated In Aguilar-Ayala v. Ruiz, 973 F.2d  
3 411 (1992) at page 413:

4 Read together, Rule 15(a) and section 3144 provide a  
5 detained witness with a mechanism for securing his own  
6 release. He must file a "written motion", Fed. R. Crim.  
7 P. 15(a), requesting that he be deposed. The motion must  
8 demonstrate that his "testimony can adequately be secured  
9 by deposition" and that "further detention is not necessary  
10 to prevent a failure of justice" 18 U.S.C. section 3144.  
11 Upon such showing, the district court must order his  
12 deposition and prompt release. Id. ("No material witness  
13 may be detained" if he makes such a showing). Although  
14 Rule 15(a) is couched in the permissive "May" not the  
15 mandatory "shall", Fed R. Crim. P. 15(a) ("the court...may  
16 direct that the witness' deposition be taken"), it is  
17 clear from a conjunctive reading with section 3144 that  
18 the discretion to deny the motion is limited to those  
19 instances in which the deposition would not serve as an  
20 adequate substitute for the witness' live testimony: that  
21 a "failure of justice" would ensue were the witness  
22 released...absent a "failure of justice", the witness must  
23 be released.

24 Any ambiguity in Rule 15(a) was resolved when the statute was  
25 amended in 2002 to differentiate between motions for depositions  
26 brought by other parties as opposed to such motions brought by the  
27 material witness themselves. The new statutory language holds that  
28 when a material witness files their own motion for a deposition,  
they do not even need to show any "exceptional circumstances" exist.  
The amended statute has already been upheld on appeal, United States  
v. Chen (N.D. Cal. 2003) 214 F.R.D. 578.

29 This is also the law in the Ninth Circuit as demonstrated by  
30 the case of Torres -Ruiz v. United States District Court for the  
31 Southern District of California, 97 CDOS 5335 (July 7, 1997). The  
32 court "agreed with the reasoning of [Aguilar-Ayala, supra]" and  
33 reversed Judge Huff who had denied a motion for a deposition on  
34 facts virtually identical to the instant action . As the court

1 stated:

2 In the instant case, two young men ages 19 and 22, have  
3 apparently been randomly selected out of a group of 27  
4 undocumented aliens and detained for a period of over 60  
5 days as material witnesses in a straightforward and  
6 uncomplicated alien smuggling prosecution. These young  
7 men state without opposition by either party to this case  
8 that they are the sole support for their respective  
9 families in Mexico, and that every day they remain in  
10 custody is a tremendous hardship on those family members.  
11 (Kilpatrick Declaration at 2) Neither petitioner is able  
12 to provide a surety for \$1000.00 bond. It is exactly  
13 circumstances such as these for which section 3144 appears  
14 to be designed.

15 Respectfully submitted,

16 LAW OFFICES OF THOMAS G. GILMORE

17 DATED: 4/18/2008

18 By: /ss/ Thomas G. Gilmore  
19 Thomas G. Gilmore, Esq.  
20 Attorney for Material Witnesses  
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